

lit

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

INTERSTATE INDUSTRIAL MECHANICAL)
INC. and THE DEPARTMENT OF SOCIAL)
AND HEALTH SERVICES OF)
WASHINGTON,)

PCHB NO. 91-50

Appellants,)

v.)

PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Respondent.)

THIS MATTER, the appeal of a notice and order of civil penalty (No. 7350), issued to Interstate Industrial Mechanical, Inc., and the Washington State Department of Social and Health Services, assessing \$1,000.00 for alleged violations of asbestos removal procedures, came on for hearing on September 10, 1991, in Lacey, Washington. Chairman Hal Zimmerman presided for the Board, with Member Annette McGee.

Bernard J. Heavey Jr., attorney at law, represented appellant Interstate Industrial Mechanical, Inc., and Susan L. Pierini, Assistant Attorney General, represented appellant Department of Social and Health Services. Keith D. McGoffin, Attorney at Law, represented respondent. The proceedings were reported by Bibiana D. Carter of Gene Barker and Associates, Olympia.

Witnesses were sworn and testified. Arguments of counsel were filed and heard. Exhibits were admitted and examined. From the

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1 testimony heard, exhibits examined, and argument the Board makes the
2 following

3 FINDINGS OF FACT

4 I

5 Interstate Industrial Mechanical Inc., (IIM) is a contractor
6 which engages in asbestos removal. On November 28, 1990, the company
7 was carrying out an asbestos abatement project for which it had been
8 employed by the State of Washington Department of Social and Health
9 Services (DSHS). The project was to remove asbestos pipe lagging from
10 steam pipes, within Building 20 of Western State Hospital, Steilacoom,
11 Pierce County, Washington.

12 II

13 On September 28, 1990, Interstate Industrial Mechanical, Inc.,
14 filed with Puget Sound Air Pollution Control Authority (PSAPCA) a
15 Notice of Intent to Remove and Encapsulate Asbestos before the
16 renovation of the building. The project was to start October 8, 1990,
17 and be completed by December 7, 1990. The notice stated that the
18 project would remove/encapsulate 10,000 linear feet of pipe
19 insulation, 24,000 square feet of VAT floor tile and 4,000 sq. feet of
20 "popcorn" ceiling.

21 III

22 DSHS also hired on August 10, 1990, Nowicki and Associates, 350
23 South 333rd Street, Federal Way, as Asbestos Consultants, to help
24 oversee the project.

25
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IV

On November 28, 1990, at approximately 9:30 a.m, Air Pollution Inspectors Victor L. Aguilar, Jr. and Dedrick S. Sheets of PSAPCA made an inspection of the project with Mr. Chris Young, Industrial Hygienist for Western State Hospital, and Ms. Diane Kosoff, an employee of IIM. The four of them went to the basement area of Building No. 20 of Western State Hospital. Upon entering Storage Room No. 2, Inspector Aguilar observed a piece of pipe in the corner of the room along the south wall with what he suspected to be asbestos-containing material on the pipe. Inspector Sheets took a photograph of the pipe. (Exhibit R-8). Inspector Aguilar observed pieces of suspected asbestos-containing material adjacent to the pipe and observed the material was dry and not adequately wetted.

V

Inspector Sheets collected a sample of the suspected asbestos-containing material for analysis, and Inspector Aguilar advised Mr. Young and Ms. Kosoff that he would issue a Violation Notice if the sample collected showed asbestos material in excess of 1%. Inspector Sheets filled out an "Asbestos Field Sample Data and Chain of Custody Form" (Exhibit R-3), for the sample he collected along the south wall. The inspectors left the site about noon, March 28, 1990, and subsequently forwarded the sample to Susan Davis of the Department of Ecology, State of Washington at the Manchester

1 Laboratory in Kitsap County for analysis. The custody form was
2 received by Pam Covey, laboratory employee.

3 VI

4 On December 13, 1991, Susan Davis' written Asbestos Analysis
5 Report of the sample was received by PSAPCA showing that, from
6 stereoscope and polarized light microscopy observations, the sample
7 contained ten percent (10%) chrysotile asbestos and ten percent (10%)
8 amosite asbestos.

9 Notice of Violation No. 10-000300 was issued January 28, 1991, by
10 Inspector Aguilar, citing PSAPCA's Regulation III, Article 4: Section
11 4.04(a)(4)(A)(B)(C) and on February 5, 1991, Notice and Order of Civil
12 Penalty No. 7350 was received by IIM, citing violations of Reg. III
13 and assessing a fine of \$1,000 against IIM and DSHS. The alleged
14 violations stated:

15 *On or about the 28th day of November 1990, in Pierce*
16 *County, state of Washington, you violated Article 4 of*
17 *Regulation III by causing or allowing the removal of*
asbestos at 9700 Steilacoom Boulevard, Building, #20 in
Tacoma, Washington; and by failing to comply with the
following sections of Article 4 of Regulation III:

18 4.04(a)(4)(A) - Failure to keep adequately wet until
19 collected for disposal any asbestos-containing
20 materials that have been removed or may have fallen off
components during the course of an asbestos project.
(Notice of Violation #10-000300)

21 4.04(a)(4)(B) - Failure to collect for disposal at the
22 end of each working day any asbestos-containing
materials that have been removed or may have fallen off
components during the course of an asbestos project.
23 (Notice of Violation #10-000300)

1 4.04(a)(4)(C) - Failure to contain in a controlled
2 area at all times until transported to a waste disposal
3 site any asbestos-containing materials that have been
4 removed or may have fallen off components during the
5 course of an asbestos project . (Notice of Violation
6 #10-000300)

7
8 VII

9 On March 4, 1991, IIM and DSHS filed an appeal to the Pollution
10 Control Hearings Board, the matter becoming PCHB No. 91-50.
11

12 VIII

13 Diane Royse Kosoff, acting supervisor on the project for IIM and
14 a certified asbestos worker, was in Building No. 2 the morning of
15 November 28, 1990, the day of the inspection. She has had experience
16 in removing asbestos and working in regulated areas under rules of the
17 Department of Labor and Industries' Washington Industrial Health and
18 Safety Act. Her work experience includes taking appropriate
19 precautions in removing asbestos materials, and she is familiar with
20 plastic enclosure, negative air pressure, respirators, glove bag
21 emergency plans and procedures and asbestos air monitoring.
22

23 IX

24 Nowicki and Associates, asbestos consulting firm, did an asbestos
25 air monitoring analysis report on November 28, 1990. Samples were
26 submitted and read by M. MacKinnon. The report showed sample results
27 for the ground floor with a flow rate of 11.5 and total of 1690 fibers
per fields at 15/per 100 and fiber/cc of .004. This air monitoring
was done as a normal part of business.

1 X

2 The day before the inspection, Ms. Kosoff's stepson Jimmy had
3 been in the room and cleaned it up in the usual manner. The pipe had
4 been glove bagged and encapsulated and cutoff and taped up in the
5 rectangular hole in the ceiling. Sometime over night the pipe fell to
6 the floor.

7 XI

8 The inspectors apparently arrived at storage room 2 before Ms.
9 Kosoff. Whether the door was open or closed was not established, and
10 there was no evidence to show that there was a barrier tape sealing
11 off the room. There had been no impediment to the inspectors
12 entering the building, breezeway or storage room.

13 XII

14 By virtue of PSAPCA's Article 4, PSAPCA has, in effect, found as
15 a legislative fact that, unless asbestos is properly handled
16 throughout its removal and disposal, there is an unacceptable risk
17 asbestos fibers may escape to the ambient outdoor air. It is entirely
18 consistent with the statutory purpose of air pollution prevention to
19 regulate activities, whether indoor or outdoors, which bear directly
20 on minimizing the risk. Reasonable consistency with statutory
21 purposes is all that is required of regulations. See e.g.,
22 Weyerhaeuser v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5
23 (1976). PSAPCA's asbestos regulations meet that test. Alpine
24
25

1 Builders, Inc. and Tacoma School District No. 10 v. PSAPCA, PCHB Nos.
2 86-183 and 86-192 (1987).

3 XIII

4 There was a chain link fence around part of the Building No. 20,
5 but no signs warning persons that it was an asbestos-removal area.
6 The fence could be locked. It was Ms. Kosoff's responsibility to lock
7 that gate. Signs were posted at the breezeway.

8 XIV

9 After the pipe had been discovered on the floor of storage room
10 2, and the inspectors had left that area, the pipe was encapsulated
11 and removed, and the room door closed and barrier-taped.

12 XV

13 Edwin L. Valbert is an employee of the DSHS and is in charge of
14 asbestos-removal projects such as at Western State Hospital. Valbert
15 has five or 10 projects at a time. Mr. Valbert's responsibilities are
16 to be sure that the state has done everything environmentally safely
17 in compliance with the law.

18 Nowicki and Associates was hired to provide asbestos removal
19 consultation services for this project. Nowicki advertised for bids,
20 wrote instructions for bidders, prepared conditions of the project,
21 involving removal of asbestos-containing materials, air monitoring,
22 project coordination and schedule.

XVI

DSHS, through General Administration, Division of Engineering and Architectural Services, had Nowicki be responsible for oversight and administration of state contracts. The contract says that the contractor shall comply with all codes and regulations governing this work, in addition to any state or federal regulations concerning asbestos control, removal, encapsulation and safety.

The contract clearly states that the contractor is solely responsible and liable for compliance with codes and standards, and for the safety of employees, visitors and the public.

It states that the contractor is independent and not an employee of the owner (the state DSHS).

XVII

Mr. Valbert testified that in a de-briefing after completion of the project, it was stated that IIM had done an acceptable job but with some time scheduling problems. The bid for the project was \$95,000.

XVIII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board makes these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over the parties and the subject

1 matter. Chapters 43.21B and 70.94 RCW.

2 II

3 We decline to rule on the contention the PCHB is
4 unconstitutionally formed because the constitutionality of the
5 legislation under which it is formed lies outside the jurisdiction of
6 this Board (RCW 43.21B.020/110).

7 III

8 We conclude that PSAPCA does have jurisdiction over such asbestos
9 abatement projects as is described in the instant case. 70.94 RCW.

10 IV

11 Asbestos is a substance which has been specifically recognized
12 for its hazardous properties. It is classified pursuant to Section
13 112 of the Federal Clean Air Act for the application of National
14 Emission Standards for Hazardous Air Pollutants (NESHAPS). It is a
15 substance which, by Federal Clean Air Act definition:

16 *causes, or contributes to air pollution which may*
17 *reasonably be anticipated to result in an increase in*
18 *mortality or an increase in serious irreversible, or*
incapacitating reversible illness.

19 V

20 The federal asbestos handling regulations have been adopted by
21 the Washington State Department of Ecology. (WAC 173-400-075(1)).
22 PSAPCA has adopted its own regulations on removal of asbestos,
23 designed to meet or exceed the requirements of the federal/state
24 regulations. PSAPCA Regulation III, Article 4.

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1 VI

2 The Washington Clean Air Act is a strict liability statute. Acts
3 violating its implementing regulations are not excused on the basis of
4 absence of intent. See RCW 79.94.040, RCW, 70.94.431; Industrial
5 Maintenance and Construction, Inc., v. PSAPCA, PCHB No. 87-179
6 (October 1988). IIM, the asbestos removal project contractor, cannot
7 rely on lack of intention or knowledge to relieve them of liability.
8 Any diligence is weighed against the amount of the fine, rather than
9 negating basic liability. Industrial, supra.

10 VII

11 Because asbestos is inherently dangerous, the duty to comply with
12 asbestos handling requirements is non-delegable. Accordingly, we have
13 held in asbestos cases a party cannot relieve itself of responsibility
14 by contract, whether that party be a public or private entity.
15 Federal Way School District #210 v. PSAPCA, PCHB No. 86-164 (January
16 28, 1987), citing Sea Farms, Inc. v. Foster & Marshall Realty, 42 Wn.
17 App. 308, 711 P.2d 1049 (1985).

18 Thus, we conclude that DOE shares in the liability for the
19 violations as charged.

20 VIII

21 The Notice and Order of Civil Penalty No. 7350 to IIM and DSHS
22 was in the amount of \$1,000 for the alleged violations November 28,
23 1990, at Western State Hospital, and were issued February 1, 1991.
24 PSAPCA has met its burden to prove the elements of a violation in a
25

1 penalty case such as this one and we conclude that each of the
2 violations did occur.

3 IX

4 While accompanied by a representative of DSHS, and also by a
5 responsible supervisor of the asbestos abatement contractor, two
6 PSAPCA inspectors visited storage room 2, after having entered
7 Building No. 20 which was site of the project. They entered the room
8 inside the basement of the building, saw a pipe with what was
9 suspected to be dry asbestos on it, took samples of material, took
10 photographs of the pipe, sent the samples to the Department of Ecology
11 laboratory at Manchester, which determined the material contained
12 asbestos. The material collected was not wet, nor had it been
13 collected, nor was it in a controlled area, where no one could enter,
14 or be warned by barrier tape or signs that it might contain asbestos.

15 Quite logically and possibly, the pipe in question did fall from
16 the ceiling where it had been taped up the previous day. But the
17 statutes do not have exceptions for accidents or "spills." It is the
18 responsibility of the contractor to encapsulate or wet the asbestos so
19 no dry asbestos fibers can escape into the atmosphere. The controlled
20 area is to be marked and designated in such a way as to prevent any
21 persons other than certified asbestos workers, with proper clothing
22 and equipment, to enter such an area. The regulations are not so much
23 for the safety of skilled asbestos workers or inspectors, but rather
24 for the protection of the general public.

The inspectors made their observations at the time they were in the room and thus were directing their allegations to what had happened from the previous day's work in storage room 2. They left the facility before knowing precisely what steps were taken to clean up the room and properly transport the material to a waste disposal site.

X

The penalty assessed in the instant case, \$1,000, is the statutory maximum.

We are mindful, however, that the civil penalties in questions are principally intended not for retribution, but the alteration of behavior. Because there had been considerable efforts to have a safe asbestos abatement project, and because IIM personnel cooperated throughout the inspection and were later said to have done an acceptable job with some time scheduling problems, we conclude that, while the fine is reasonable as placed on IIM as contractor for the project, and on DSHS, as owner and responsible for the building and grounds, some mitigation is appropriate.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

ORDER

The Violations and \$1,000 Civil Penalty No. 7350 are AFFIRMED, with \$500 suspended, provided that neither appellant has a violation of air pollution regulations in the next year.

DONE this 16th day of December, 1991.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Presiding


ANNETTE S. M^cGEE, Member

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